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# In the Supreme Court of the United States.

OCTOBER TERM, 1922.

JEEMS BAYOU FISHING AND HUNTING Club, Producers Oil Company, and the Texas Company, appellants,
*v.*
THE UNITED STATES OF AMERICA. } No. 119.

THE UNITED STATES OF AMERICA, appellant,
*v.*
JEEMS BAYOU FISHING AND HUNTING Club, Producers Oil Company, and the Texas Company. } No. 137.

*APPEALS FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.*

## BRIEF FOR THE UNITED STATES.

### THE PLEADINGS.

In its bill of complaint the United States alleged that it was and still is the owner of a designated tract of land in section 10, T. 20 N., R. 16 W., in Louisiana, containing 85.22 acres, being lots 8, 9, and 10, as

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shown by a plat of survey approved March 28, 1917. These lots are located in the fractional southwest quarter of that section. It was further alleged that on December 15, 1908, the President withdrew from settlement and entry and all other forms of appropriation all of the public lands in that township, as well as others not here in controversy; that on July 2, 1910, the President, by virtue of the authority conferred by the act of June 25, 1910 (36 Stat. 847), ratified and continued in force the previous order of withdrawal; that notwithstanding, the defendants, in bad faith, took possession and drilled seven wells out of which large quantities of oil were withdrawn; that this was done under color of a pretended lease made by the Jeems Bayou Fishing & Hunting Club to the Producers Oil Company, dated October 17, 1910; and that the value of the land and of the oil taken exceeds $100,000. Appropriate relief was prayed for (4). Each of the three defendants filed separate answers, but they do not require separate treatment. The drilling of the wells and the taking of oil were admitted, but the defendants deny that the land was a part of the public domain. On the contrary it was asserted that on April 2, 1860, the United States, under the homestead laws, issued a patent to Stephen D. Pitts to the fractional southwest quarter of section 10; that according to the field notes and the plat of survey this fractional section borders on Jeems Bayou, or Ferry Lake, a navigable body of water; that the patent, under which the defendant claims, operated to convey title to the

water's edge; and that the Department of the Interior was without jurisdiction to make a new survey. An estoppel was also pleaded, it being in substance alleged that in 1897 inquiry was made of the General Land Office whether the United States still owned any land in this vicinity, the reply being that it did not (13, 27, 34).

At this point it may be mentioned that no controversy exists as to the amount and value of the oil withdrawn. Its value, as the master found on undisputed testimony, was $293,234.18 (635–636); the cost of drilling and operating was $113,912.45, the difference, amounting to $179,321.73, representing the net value. Of this amount the Producers Oil Company paid to the Jeems Bayou Fishing & Hunting Club, its lessor, as royalty, $36,654.27. All of the oil was sold by the Producers Oil Company, the lessee, to the Texas Company. The master therefore recommended a decree establishing title in the United States and that judgment be entered against the Producers Oil Company and the Texas Company *in solido* for $142,667.46, and against all of the defendants *in solido* for $36,654.27, representing the royalties paid (636). Both parties filed exceptions, the United States on the ground that the defendants were not entitled to be credited with the cost of drilling and operating; the defendants on the ground that the land from which the oil was taken did not belong to the United States. All exceptions were overruled (672) and a decree entered in conformity with the

master's recommendations (676). Both parties appealed to the Circuit Court of Appeals on substantially the same grounds as set forth in their exceptions to the master's report. That court affirmed the decree (718). Both parties thereupon took appeals to this court, the defendants on the ground that the court was wrong in adjudging the property to belong to the United States, and the United States on the ground that the court was wrong in allowing the defendants credit for the cost of drilling.

THE FACTS.

The township was originally surveyed by Warren in 1839. Both his field notes and the plat of his survey were introduced in evidence. A township, if unoccupied by bodies of water, is supposed to contain 23,040 acres. Warren's plat shows that there were 10,328.09 acres, the rest of the township, amounting to approximately 12,711.91 acres, being occupied by Ferry Lake. All the way through the testimony reference is made to the 173.09-foot contour of the lake. This represents the mean high-water elevation of the lake in 1812, when Louisiana was admitted to the Union, and in 1839, when the Warren survey was made, above mean Gulf elevation, the reasons for adopting this level being explained at pp. 108 and 109. Ferry Lake is about 30 miles long and 2 miles wide (373), and first came into being about 1777 (356), during what is termed the great raft of the Red River, into which it flows (376). The presence of this raft operated to hold the waters of Red River

back and consequently to fill in the basin occupied by Ferry Lake. This raft was removed in 1874 (384). Naturally its removal operated to lower the level of the lake. Instead of being at an elevation of 173.09 its level is now 167 (69, 138). In other words, it was 5 to 7 feet higher in 1839, when Warren surveyed the township, than it is now (233).

Certain official surveys made of the township subsequent to the Warren survey of 1839 should now be noted. In 1841, two years after the Warren survey, a commission was appointed to establish the boundary line between Louisiana and the then Republic of Texas. It was then determined for the first time that the westerly portion of the township, as located by Warren, was within the Republic of Texas. Accordingly Morse, a deputy surveyor, was employed to connect the Warren section lines in the west tier of sections with the monuments upon this international boundary line, which resulted, of course, in fractional sections along the west tier. A plat of his survey was approved by the Surveyor General on July 24, 1846, and to that extent Morse's plat supersedes the Warren plat (81, 82). The Morse survey is only indirectly involved in this litigation. The proof shows that when Warren ran his section lines, he terminated them, with remarkable accuracy, at the 173.09-foot contour, which represented the then water's edge (71). But when he ran his so-called meander lines, he apparently paid no attention whatever to the 173.09-foot contour (130 et

*passim*). He should have had no difficulty in running his so-called meander line at this elevation (150), and if he had done so no land would have been omitted from his survey (84). His meander line ought to have conformed substantially to the line of the lake (77). As already indicated, Warren terminated his section lines, with a remarkable degree of accuracy, at the proper level of the lake, but whenever he attempted to run a meander line, if this is the proper term to use, he showed an absolute indifference to the level of the lake. Accordingly, when Morse made his survey along the western portion of the township he found that Warren's *section* lines agreed with the lake level but that his *meander* lines did not (82).

The next corrective survey was made by Boyd in 1854. He resurveyed sections 31 and 32, or, more accurately speaking, made an extension survey of these two sections, the effect of which was to survey land which Warren had represented as constituting a part of the bed of the lake (80, 81). The land thus surveyed by Boyd comprises lot 4 of section 32 and the fractional southeast quarter of section 31, the area being approximately 75 acres (133). To be more accurate the land surveyed by Boyd, which Warren omitted from his survey, constitutes 90.44 acres (156).

The next survey was by Bristol in 1871. (His survey is mentioned at some length in *Producers Oil Co.* v. *Hanzen*, 238 U. S. 325.) He, too, surveyed land which Warren had omitted from his survey and

which Warren represented as covered by the lake when, as a matter of fact, it was upland. Bristol's extension survey covered portions of sections 4, 9, and 10 (68, 133). The amount of land in these sections thus surveyed by Bristol, but omitted by Warren, is 280.12 acres (145).

The next survey was by Kidder. The first thing he did was to reestablish the lines of Warren's survey; that is to say, he located all of the corners of Warren's survey which were still in existence, and then from these corners ran the courses and distances mentioned in Warren's field notes. This resurvey plat was approved July 24, 1916 (86). Inasmuch as this resurvey disclosed that Warren had omitted a lot of upland not included in the Boyd and Bristol surveys, Kidder was directed to make what is termed an extension survey; that is to say, a survey of the land which Warren had omitted. This extension survey was made in 1916–17 and the plat was approved March 28, 1917 (117). The land thus included in Kidder's survey, but omitted from Warren's survey, embraces 617.20 acres (117), distributed throughout the township as follows:

Section 3 (lots 1, 2, and 3), 17.43 acres; section 4 (lots 3, 4, and 5), 28.74 acres; section 9 (lots 5 and 6), 66.29 acres; section 10 (lots 6, 7, 8, 9, and 10), 129.60 acres; section 12 (lot 1), 21.82 acres; section 13 (lot 1), 27.87 acres; section 15 (lots 1 and 2), 23.84 acres; section 16 (lot 1), 28.33 acres; section 23 (lots 1 and 2), 17.74 acres; section 24 (lot 1), 11.49 acres; section 25 (lot 1), 8.40 acres;

section 27 (lots 1, 2, and 3), 79.90 acres; section 32 (lot 5), 44.21 acres; section 36 (lots 1 and 2), 13.80 acres (119–120). The total area thus surveyed by Kidder is 617.21 acres (117, 120).

The total acreage thus erroneously omitted from the Warren survey of 1839 and afterwards included in the subsequent surveys is:

Boyd survey of 1854 (sections 31 and 32), 90.44 acres.

Bristol survey of 1871 (sections 4, 9, and 10), 280.13 acres.

Kidder survey of 1916–17 (sections 3, 4, 9, 10, 12, 13, 15, 16, 23, 24, 25, 27, 32, 36), 617.21 acres.

Total 987.78 (155).

Confining our attention now to Warren's so-called meander line through section 10, where the lands in controversy are situated, we find that according to his field notes he ran 24 meander courses. At no place does this line in that section agree closely with the border of Ferry Lake except at the *beginning* point of the eastern boundary and at the *terminating* point of the northern boundary (77). There is interesting testimony in the record showing how far in reality the lake was from this so-called meander line. As just mentioned, there are 24 meander courses which give 23 angles or turning points (77). Beginning at a point in the northwest quarter of section 10, where Bristol's meander line (which will hereafter be referred to), connects with Warren's meander line, and running southerly, the distances to the actual edge of the

lake from the various angles along the so-called Warren meander line in the northwest quarter and the southwest quarter of section 10, are as follows:

From angle point 2 in a southwesterly direction 3,950 feet, in a northwesterly direction 1,390 feet, in a southeasterly direction 1,920 feet; from angle point 3, 3,500 feet in a southwesterly direction; from angle point 4, 3,200 feet; from angle point 5, 3,450 feet; from angle point 6, 3,300 feet; from angle point 7, 3,040 feet; from angle point 8, 2,900 feet; from angle point 9, 3,200 feet; from angle point 10, 2,450 feet; from angle point 11, 2,848 feet to the west and 150 feet to the southeast; from angle point 12, which is at the margin of an embayment of Ferry Lake, 2,115 feet west; from angle point 13, 396 feet to the south; from angle point 14, 165 feet to the southwest (141–144). The average distance of the Warren meander line in section 10 to the lake is 2,510 feet (145–146).

As already stated Bristol in 1871 surveyed certain lands in sections 4, 9, and 10 which had been erroneously omitted from the Warren survey, the area amounting to 280.12 acres (145). Singularly enough, he too made a remarkable error in running his meander line. He began on the northern boundary of section 10 at the meander corner which Warren had established, and continued the section line west to the lake where Warren, if he had surveyed correctly, should have gone. Having thus established section lines at the north end of sections 9 and 10, he started

his meander line at a point on the section line between sections 4 and 9. Roughly speaking, his meander line described a large letter C. He went north into section 4, then turned west in the same section, then came south along the east margin of Jeems Bayou in sections 4 and 9, but instead of following the lake all the way around he abruptly left the shore line at a point in the southeast quarter of section 9 and, departing from the lake, proceeded easterly and northeasterly until he terminated his meander line on Warren's meander line in the northwest quarter of section 10 (153). The line from the point where he abruptly left the lake in the southeast of section 9 to its terminus in the northwest quarter of section 10, represents the *southern* boundary of the 280.12 acres surveyed by Bristol. But this portion of his meander line is altogether wrong (157). Instead of paralleling the lake he departs from it at a right angle, and his line is not in accordance with any rules known to surveyors in running meander lines (167). It is erroneous in every way (168) and is a manifest error (169). As a result of this error, he omits from his survey 235.35 acres to the south of his south meander line, located in sections 9, 10, 13, and 16, this omitted area being later included in Kidder's survey of the 617.21 acres.

Coming now to Warren's meander line, the testimony establishes beyond all controversy that it was erroneous in every way. There is not the slightest evidence of water along this line in section 10 (125). It was apparently run without regard to the border

of Ferry Lake and without regard to any contour or shore marks (130). Strangely enough, the average height of the land omitted from the Warren survey is greater than the height of the land actually included in the survey (124, 131). There is no reason for Warren running his meander line in the way he did (148). He should have had no difficulty in running a proper meander line (150), for the omitted area is upland and not swamp in character (152). His error is a manifest one (170). There is no foundation for the theory that in running his meander line the way he did, he was trying to arrive at an average in following the sinuosities of the lake shore (198). His meander line does not follow the lake and is a manifest error (210–211). It is an incorrect survey (231) and is a manifest error (232). His line does not follow the lake or mark its sinuosities (262) and is a manifest error (260). His meander line is without justification (305), and there is no doubt about its incorrectness (352). It is a manifest error (461). This testimony came from various witnesses.

The land in controversy in this suit (lots 8, 9, and 10 in the fractional southwest quarter of section 10), constitutes a part of a larger compact body, all of which was omitted from the Warren survey. We have already seen that the land included in Bristol's survey, omitted from Warren's, amounts to 280.12 acres, located in sections 4, 9, and 10. The area of land in sections 9, 10, 15, and 16, lying south of Bristol's south meander line, which was erroneously omitted from his survey, is 235.35 acres (167). In

other words, Warren omitted from his survey a compact body of 515.47 acres lying in sections 3, 4, 9, 10, 15, and 16, comprising the 280.12 acres which Bristol surveyed and the 235.35 acres which he did not. The area in lots 8, 9, and 10 involved in this suit is 85.22 acres (128) and, as already stated, is a part of a larger parcel in sections 9, 10, 15, and 16, comprising 235.35 acres, omitted from both the Warren and the Bristol surveys; and is a part of the compact body of 515.47 acres omitted by Warren, 280.12 acres of which were included in the Bristol survey of 1871.

It is somewhat remarkable that after Warren had omitted such a large area from his survey, Bristol, who was later employed to survey some of the omitted area, should himself commit a similar error. But the evidence is undisputed that while a good portion of his meander line is substantially correct, he nevertheless committed a palpable and inexcusable mistake when upon reaching a point in the southeast quarter of section 9 he departed abruptly at right angles from the shore of the lake and ran his line to a point of connection with Warren's in the northwest quarter of section 10, a distance of approximately 4,680 feet. This portion of his meander line is absolutely wrong. It does not conform in any way to the mean high-water elevation of the land and is not a contour line. On the contrary it is an irregular line through wooded upland, at a considerable elevation above mean high water, and does not agree with any bank or other surface marks indicating the presence of water. The

forest growth to the right and left of the line is identical (157,158). The character of the land through which this line runs is described in detail at pages 158–169. The line is not run in accordance with any rules known to surveyors in regard to running meander lines (167); is not parallel with the contour of the lake (167); it leaves the lake almost at right angles and runs through timber growth (167), the area being upland in character, with no marsh, pond, or basin (167). It is erroneous in every way throughout its entire length along the south boundary, and does not conform in any particular to the requirements of a meander line (168), there being nothing to indicate that it borders a body of water or approximates even in a remote degree a border of a body of water. The error is manifest and there is nothing to justify Bristol in placing the meander line where he does (169). The portion of his line just mentioned does not represent the border of the lake or any body of water; there is no water course or body of water along the line. It does not follow the sinuosities of the lake or even approximate them. It does not follow any contour (263). It does not run parallel to or even approximate the contour. It cuts across high land, over high bluffs, far above the contour representing mean high-water elevation (264). The lake lies about three-quarters of a mile south. There is nothing in the field notes other than inference to show that he was meandering the lake in running the line from A to C, which is his south boundary (266). The lake is not visible from the point B to point C on

his line (167). The exact distance from point B in a due southerly direction to the lake is 3,437.28 feet, about three-quarters of a mile (267). If the line was intended to represent the meander of Ferry Lake, it is incorrect and the error manifest (267, 268). His meander line is incorrect (319). His meander line from A to C goes through upland, the topographical features on both sides being the same, with no indications of a bank or stream (353, 354). This testimony also came from several witnesses.

Another interesting feature in connection with Warren's survey is the fact that his field notes do not in reality show that he was attempting to meander any stream. As already indicated, he terminated his *section* lines with remarkable accuracy at the edge of the lake, but his *meander* lines were run without any reference to a contour. His field notes do not show that he is following the margin of the lake, unless this can be inferred from such language as "Front section 24, Front section 13, Front section 12," etc. (254). There is no mention whatever in his field notes purporting to be a meander of the lake, no mention of the lake (255–256). Warren's survey gives no numbers to his angle points. He gives simply courses and distances. The angle points were numbered by Kidder's surveying party to make the records clear, and the courses and distances given in the Warren field notes make no reference to the shore (256). In describing the line between sections 10 and 11 and between sections 3 and 4, Warren mentions that he set a post at the lake. These are the only

points where he mentions in his field notes the lake in connection with his survey of section 10 (257). In referring, as Warren does, in his field notes to the traverse in front of certain sections, the inference is that they were bounded by water, but the presumption is not an absolute one, the inference being simply that he surveyed land bordering on the lake (271).

Another peculiarity about the case is the remarkable discrepancy in the acreage embraced in the patent to the fractional southwest quarter of section 10, under which the defendants deraign title. The patent to the fractional southwest quarter recites that it contains 23 acres (554). Whether this is a mistake or not, and if a mistake how it ever occurred, is left only to conjecture. By examining Warren's plat it will be seen that he gives the area of the fractional *southeast* quarter at 23 acres and that of the fractional *southwest* quarter, with a tongue of land extending a short distance into the northwest quarter, at 55.88 acres.

The actual area in the fractional southwest quarter surveyed by Warren is 50.88 acres, the tongue of land just mentioned, which extends into the northwest quarter, comprising about 5 acres, which makes the total of 55.88 above mentioned (183). While the patent for the fractional southwest quarter represents the acreage as 23, yet the survey made by Warren represents that fractional quarter as containing 55.88 acres, a palpable error (240). An accurate survey shows that part of the 55.88 acres surveyed by War-

ren which lies within the actual limits of the fractional southwest quarter to be 47.88 (241).

In this suit the Government in no way attacks the validity of the defendants' title to the 47.88 acres, notwithstanding the fact that the patent calls for only 23 acres. If the defendants prevail, they will acquire title to lots 8, 9, and 10, containing an area of 85.22 acres (128); and if it should be held that their title runs beyond section 10 to the actual margin of the lake they will acquire title to an additional 23.84 acres, constituting lots 1 and 2 of section 15 (119).

We have already stated that the 173.09-foot contour represents the elevation of the lake as it existed in 1812 when Louisiana was admitted to the Union and in 1839 when the township was first surveyed. The question naturally arises how this was determined. We have already adverted to the fact that when Warren ran his *section* lines he terminated them at the actual margin of the lake. When Kidder resurveyed, with the aid of Warren's field notes, the township as surveyed by Warren, he was able to tell with precision where Warren terminated these section lines. He found these points of termination to be the 173.09-foot contour. Of course Warren himself makes no mention of the 173.09-foot contour, this being, as previously explained, the elevation of the lake above mean Gulf level (108–109). Kidder thereupon set posts at the 173.09-foot elevation flanking the body of Ferry Lake in the township in question as it exists to-day. Geologists and

ecologists were employed by the Government to determine from geological and ecological evidence just where the margin of the lake was in 1812 and in 1839. They found from the sources of evidence just mentioned that the 173.09-foot contour was the actual elevation of the lake at that time. We deem it unnecessary to refer to the voluminous testimony which established this fact. The master found that to be the proper elevation; the District Court found likewise; and the Court of Appeals found the same way. The master said that a detailed reference to the evidence on this subject was unnecessary, since this elevation was stipulated to be the proper elevation in suits Nos. 1153, 1158, 1162, 1163, and 1164 (in this court Nos. 160, 161, 162, and 163) (District Court No. 1164 was not appealed). The master then went on to say that this fact "is not seriously denied, since all evidence is in, by the other defendant litigants" (625). Indeed one of the defendants, the Jeems Bayou Fishing and Hunting Club, in certain litigation involving these lands which it had with the board of commissioners of the Caddo levee district, asserted, as a part of its case, that the lands were not swamp or overflowed lands, and it denied that the same had ever been formed, either in whole or in part, since the survey "in the long ago" (580, 584, 630).

It is, of course, not controverted that the official plat of Warren's survey represents Ferry Lake as bordering on the fractional southwest quarter of section 10 (139).

It will only be necessary to state their substance:

1. The defendants in brief say that the Court of Appeals was wrong in adjudging the property in question to belong to the United States. In other words, the court ought to have held that the patent issued to Pitts on April 2, 1860, embracing the fractional southwest quarter of section 10, operated to convey title to the margin of the lake, which, of course, would include the lands in controversy (726).

2. In the cross appeal taken by the United States, the Government, in assigning error, says that the Court of Appeals was wrong in adjudging that the defendants were entitled to credit for the cost of *drilling* the wells from which the oil was taken. In the Court of Appeals the Government's assignments of error took a broader scope. It was there asserted that the District Court was wrong in allowing the defendants credit for both the cost of *drilling* and *operating*. In this court, however, we attack the ruling of the court below only to the extent that it allowed the defendants credit for the cost of *drilling* (736).

ARGUMENT.

**It is submitted that if this court, under the circumstances disclosed in this record, should now adjudge that the patent under which the defendants claim passed title to the water's edge, the effect will necessarily be to overrule a long line of authorities.**

We shall briefly call attention to these cases:

*Horne* v. *Smith*, 159 U. S. 40. In this case the Government plat represented fractional sections as bordering on a named *river*. As a matter of fact, the water bordering on the fractional sections was not a river but a *bayou*. Between the bayou and the river was a tract of ground, 600 acres in extent, which the plaintiff claimed to own by virtue of the patents to the fractional sections. The river was, in fact, a mile beyond. This court held that title under the patents stopped at the *bayou*.

*Niles* v. *Cedar Point Club*, 175 U. S. 300. In this case a meander line was run by the Government surveyor. Both the field notes and the plat showed a "marsh" and "impassable marsh and water" lying beyond the meander line. It was held that a patent to the fractional sections bordered by this meander line did not carry title beyond to the shore of Lake Erie.

*French-Glenn Live Stock Co.* v. *Springer*, 185 U. S. 47. Both the field notes and the plat represented Malheur Lake as bordering on certain fractional sections. Asserting that the patents thereto operated to convey title to the water's edge and therefore gave riparian rights to whatever land in front was

left dry by the recession of the lake, the plaintiff, deraigning title under these patents, sued to recover possession of the land thus left dry. The jury having determined by its verdict that the lake never existed in front of these fractional sections, this court, overruling the contention that the field notes and the plat were conclusive, held that title under the patents stopped at the so-called meander line.

*Security Land & Exploration Co.* v. *Burns*, 193 U. S. 167. The exterior lines of a township were surveyed, but with one small exception no survey was made of the interior. The survey was in fact fraudulent. The plat based upon this survey represented certain fractional sections as bordering on a lake when in fact the lake was nearly a mile away. It was held that patents to the fractional sections did not pass title to the large area lying between the so-called meander line and the actual shore of the lake.

*Chapman, & Dewey* v. *St. Francis*, 232 U. S. 186. A township plat of survey indicated an unsurveyed area of approximately 800 acres, designated thereon as "Sunk Lands." This area was meandered as though it were a lake when in fact it was only temporarily overflowed. It was held that a patent granting the township to Arkansas under the swamp land act did not operate to pass title to the part thus erroneously designated on the plat as a lake.

*Producers Oil Co.* v. *Hanzen*, 238 U. S. 325. The official plat, based upon a survey in 1871, showed two lines in close proximity to each other, one

representing the surveyor's traverse lines and the other the shore of a bayou. To use the language of this court, the plat "is very small and does not indicate with certainty whether traverse lines or the stream constitute" the boundary. In describing one of the courses, the field notes recited that at a designated point a "spur of marsh extends out north." While recognizing the general rule that patents to fractional sections bordering on a navigable stream carry title to the water's edge, it was held that the circumstances just referred to, as well as others mentioned in the opinion, such as the discrepancy between the number of acres designated in the patent and the area in dispute, took the case out of the general rule.

*Lee Wilson & Co.* v. *United States*, 245 U. S. 24. In this case it was held that although the Government survey indicated a lake, 853.60 acres in extent, within the township, the Government, nevertheless, in patenting the township to the State of Arkansas, did not part with the title to the 853.60 acres, the lake itself being a myth and the survey a mistake in this respect.

**It is of course not disputed that the general rule is that a lake or watercourse shown on the plat of survey is the real boundary, and that a patent conveys title to the water's edge and not merely to the meander line.**

In one of the main cases, *Railroad Co.* v. *Schurmeir*, 7 Wall. 272, in which this doctrine was laid down, the court says:

> In preparing the official plat from the field notes, the meander line is represented as the

> border line of the stream, and shows to a demonstration that the watercourse and not the meander line, as actually run on the land, is the boundary.

Another leading case is *Mitchell* v. *Smale*, 140 U. S. 406. There a patent was issued to a fractional quarter of a fractional section, containing 4.53 acres. Both the field notes and the plat based thereon showed that the lake bordering upon this fractional section was meandered. There was, however, a tongue of land, containing 25 acres, extending into the lake. While it was held that under the circumstances shown the patent operated to pass title to the water's edge and therefore to include this area, the court was nevertheless careful to say:

> We do not mean to say that in running a pretended meander line the survey or may not make a plain and obvious mistake, or be guilty of a palpable fraud; in which case the Government would have the right to recall the survey and have it corrected by the courts, or in some other way. Cases have happened in which, by mistake, the meander line described by a surveyor in the field notes of his survey did not approach the water line intended to be portrayed. Such mistakes, of course, do not bind the Government.

But the court continued:

> In the present case it can not be seriously contended that any palpable mistake was made or that any fraud was committed by the surveyor who made the survey in 1834–35.

In the present case, however, the undisputed evidence establishes, we submit beyond all controversy, that a palpable mistake was made.

**The Government is in no way seeking to cancel the patent under which the defendants claim. The question is simply one of determining at what line the title under that patent stops. Under the allegations of the Government's bill proof was therefore admissible to determine where the true boundary line is.**

The issue is whether the tracts in controversy are included in the patent. The patent speaks for itself so far as the description is concerned, and the question is whether title stopped at Warren's so-called meander line, or whether it extended beyond that line to the actual edge of the lake. Assuming that his traverses were intended as meanders, which is not true, it is clear that the testimony offered to establish error in these lines was competent. The effect of such evidence was only to show that the patented area was bounded by those traverse lines. It did not tend to change the location or area of the patented tract.

In *Security Land & Exploration Co.* v. *Burns*, 193 U. S. 167, 183:

> Nor in such case is it necessary to go into equity to reform the patent. Where the patentee has in fact received and is in possession of all the land actually described in the lines and distances, and is seeking for more on the theory that his plat of survey carries him to the water, a denial of that claim upon such facts as appear here is well founded and re-

quires no reformation of the patent. It is simply a question of boundary, and it is a legal defense; it is but a denial that the land claimed is in fact included in the patent as it exists, and no aid of a court of equity is necessary to sustain such a defense.

To the same effect:

*Niles* v. *Cedar Point Club*, 175 U. S. 300, 308.

*Lee Wilson & Co.* v. *United States*, 245 U. S. 24, 31.

*Graham* v. *Gill*, 223 U. S. 463.

*French-Glenn Live Stock Co.* v. *Springer*, 185 U. S. 47.

*Horne* v. *Smith*, 159 U. S. 40.

*Kirwan* v. *Murphy*, 189 U. S. 35.

Indeed in *Mitchell* v. *Smale*, 140 U. S. 406, evidence as to the correctness or incorrectness of Government surveys was admitted in a plain action of ejectment, apparently without any allegations in the pleadings as to the incorrectness of the Government survey.

See also *Hardin* v. *Jordan*, 140 U. S. 371.

**There is no merit in the contention that the Government is estopped to prosecute this suit by reason of the letter written by the Commissioner of the General Land Office to Senator Blanchard or by reason of the letter of the Director of the Geological Survey to the Secretary of the Interior.**

*Utah Power & Light Co.* v. *United States*, 243 U. S. 389.

*Lee Wilson & Co.* v. *United States*, 245 U. S. 24.

**The defense of laches is not available.**

*United States* v. *New Orleans Pac. Ry. Co.*, 248 U. S. 507.

**The Court of Appeals was wrong in allowing the defendants credit for the cost of drilling the well.**

As already indicated, the Government's assignments of error in the Court of Appeals assailed the action of the District Court in allowing the defendants credit for both the cost of *drilling* and of *operation*. The assignments of error in this court simply challenge the action of the District Court in allowing credit for the cost of *drilling*. Inasmuch as our brief in consolidated cases Nos. 117, 104, 111, 112, 113, 114, 115, and 116 goes at length into the question of the proper measure of damages, we think it unnecessary to repeat the argument here, particularly because some of the counsel appearing in those cases also appear here. The following cases sustain our contention:

*United States* v. *St. Anthony R. R. Co.*, 192 U. S. 524.

*United States* v. *Midway Northern Oil Co.*, 232 Fed. 619, 633.

*United States* v. *McCutchen*, 238 Fed. 575, 593, 594.

*St. Clair* v. *Cash Gold Min. & Mill. Co.*, 9 Colo. App. 235, 241; 47 Pac. 466, 468.

*Hall* v. *Abraham*, 44 Ore. 477, 481; 75 Pac. 882, 883.

*Martin* v. *Porter*, 5 Mees. & W. 351 (1839).

*Morgan* v. *Powell*, 3 Q. B. 278 (1842).

*Llynvi Co.* v. *Brogden*, L. R., 11 Eq. 188 (1870).

That portion of the decree of the Court of Appeals awarding the land in question to the United States

should, it is respectfully submitted, be affirmed; but that portion giving the defendants credit for the cost of drilling should be reversed.

JAMES M. BECK,
*Solicitor General.*
WILLIAM D. RITER,
*Assistant Attorney General.*

NOVEMBER, 1922.

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